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No. 01-526

In the Supreme Court of the United States

SUZANNE C. COSTO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the deaths of petitioners' decedents arose out of or occurred in the course of activity incident to service under the doctrine of *Feres* v. *United States*, 340 U.S. 135 (1950).

2. Whether *Feres* v. *United States*, *supra*, should be overruled.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-28) is reported at 248 F.3d 863. The opinion of the district court (Pet. App. 29-34) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 2001. A petition for rehearing was denied on June 29, 2001 (Pet. App. 35-36). The petition for a writ of certiorari was filed on September 26, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On July 1, 1995, petitioners' decedents, Nollie P. Costo and Christopher J. Graham, were killed while

participating in a rafting trip that was sponsored by the Navy's Morale, Welfare, and Recreation Department. Pet. App. 2, 29. At the time of the accident, Costo and Graham were active-duty sailors stationed at the Naval Air Station, Whidbey Island, Washington (NAS Whidbey). *Id.* at 2. They were off duty (or, on "liberty") at the time of the accident, but they were eligible to participate in the trip because of their active-duty status. *Id.* at 2-3, 32-33. They were subject at all times to military discipline and regulations with respect to their conduct on the trip as well as their custody of the rafts, oars, and life vests that were provided by the Navy. *Id.* at 33-34.

The rafting trip was run by civilian employees of the Navy, and was under the command responsibility of the commanding officer at NAS Whidbey. Pet. App. 3. The trip was open to active duty personnel at NAS Whidbey and, on a space-available basis, to their family members and guests and others with official connections to the military. *Id.* at 32; C.A. R.E. 82-83. Of the 25 individuals who participated in the trip, nine were active duty service members, six were guides or guide trainees, and at least five others were family members of active duty personnel. Gov't C.A. Br. 9 (citations omitted). The record does not identify the type of service connection of the five other trip members. The trip was supported by Navy appropriated funds and by fees paid by individual rafters. Pet. App. 32.

2. Petitioners commenced this action in United States District Court for the Western District of Washington. They sought damages against the United States pursuant to the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346 (Supp. V 1999), based on allegations that the Navy "breached its duty to the plaintiffs" by failing to obtain a permit for the rafting trip, failing

to hire properly trained guides, and failing to supervise properly the guides it hired. Pet. App. 4; C.A. E.R. 3 (Compl. paras. IX-XI). Petitioners also contend that the Navy "breached its duty" by failing to scout out the river, to equip the rafts properly, to instruct the rafters properly, to rescue the rafters, and to administer life-saving aid. *Ibid.*

The district court dismissed the complaint for lack of subject matter jurisdiction under the *Feres* doctrine, which bars FTCA suits by or on behalf of service members for service-related injuries. Pet. App. 29-34. The Ninth Circuit affirmed, holding that the decision was controlled by its prior decision in *Bon* v. *United States*, 802 F.2d 1092 (1986). *Bon* applied the *Feres* doctrine to bar an FTCA suit that was brought by a servicewoman who was injured when a canoe she had rented from a Navy recreational center was hit by a serviceman driving a recreational motorboat also rented from the center. The Ninth Circuit held that *Bon* is similar to this case because Costo and Graham, like the plaintiff in *Bon*, were injured while on active duty and while participating in a military recreational program to which they had access because of their active duty status. Pet. App. 8-9. Judge Alarcon dissented, on the ground that the *Feres* doctrine "violates the equal protection rights of military service men and women" and "violates our constitutional separation of powers." *Id.* at 13-28.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. In *Feres*, this Court held that service members cannot bring tort suits against the government for injuries that "arise out of or are in the course of activity incident to service." 340 U.S. at 146. In subsequent cases, the Court "has never deviated from this characterization of the *Feres* bar," *United States* v. *Johnson*, 481 U.S. 681, 686 (1987) (citations omitted), and has emphasized that the "incident to service" test requires a case-by-case approach that focuses on the totality of the circumstances. See *United States* v. *Shearer*, 473 U.S. 52, 57 (1985). The court of appeals correctly applied that test in this case to bar claims based on the accident that occurred to petitioners' decedents while they were on active-duty military service and engaging in a military-sponsored activity that they participated in by virtue of their military status.

a. Petitioners contend (Pet. 13-15) that this Court's decisions in *Feres*, its prior decision in *Brooks* v. *United States*, 337 U.S. 49 (1949), and its subsequent decision in *United States* v. *Brown*, 348 U.S. 110 (1954), each lead to the conclusion that their action may go forward under the Federal Tort Claims Act. Those contentions are mistaken.

i. In *Brooks*, the Court held that servicemen injured in a car accident on a public highway could bring an FTCA action based on the negligence of the civilian driver of a military vehicle who hit them. It was a mere fortuity that the driver who hit the servicemen was driving a military, rather than a civilian, vehicle. The "accident had nothing to do with [the servicemembers'] army careers, * * * except in the sense that all human events depend upon what has already transpired." 337 U.S. at 52. The Court specifically left open the question —later decided in *Feres*—whether an FTCA action

would lie for injuries received "incident" to military service. *Ibid.*

In this case, unlike in *Brooks*, the connection between the accident and the decedents' military service was not a mere fortuity, and the accident was "incident to" the decedents' military service. Costo and Graham were involved in a military-sponsored activity at the time of their deaths, and they participated in that activity by virtue of their active-duty military status. Under this Court's cases, nothing more is necessary to make the *Feres* doctrine applicable.

ii. Petitioners also err in contending that *Feres* itself supports their claim. The Court in *Feres* addressed three claims, two of which involved medical malpractice and one of which involved a claim of wrongful death resulting from a barracks fire. Petitioners argue (Pet. 14) that this case is different from those in *Feres*, because Costo and Graham "were on prolonged liberty far from their duty stations" and "there is no hint in the record of negligence by any military service member—only by civilians."

Petitioners' contentions are mistaken. *Feres* did not turn on the location of the accidents, because active-duty members of the military are subject to military discipline and operate within the military command structure at a variety of locations. Nor did *Feres* turn on the military status of the party alleged to have been negligent. Indeed, in *Johnson*, the Court rejected petitioners' contention that the civilian status of the alleged tortfeasor is determinative. In that case, the Court held that the *Feres* doctrine barred an FTCA suit brought by the widow of a Coast Guard helicopter pilot who was killed while performing a rescue mission on the high seas. The Court applied *Feres* even though the alleged tortfeasors were civilians, explaining that "the

status of the alleged tortfeasor does not have * * * critical significance" in light of the rationales that support *Feres*, see 481 U.S. at 689, and noting that the lower courts have not understood "the military status of the alleged tortfeasor * * * to be relevant under *Feres*," *id.* at 686-687; see also *id* at 687 n.8 (citing cases).

iii. Finally, petitioners err in contending (Pet. 14) that this Court's decision in *Brown* supports their claim. The Court in *Brown* permitted an individual who had been discharged from military service years before to bring a suit based on alleged malpractice in a Veterans Administration hospital. The Court specifically distinguished in *Brown* between "injuries that did and injuries that did not arise out of or in the course of military duty." 348 U.S. at 113. Because the plaintiff in *Brown* had left the military years before the negligence that was the basis of his suit, his claim was not barred by the *Feres* doctrine. *Id.* at 112. In this case, by contrast, petitioners' decedents were on active military service at the time of the accident and the accident occurred while they were on a military-sponsored activity that they participated in by virtue of their military status. Nothing in *Brown* suggests that petitioners' claim may be brought notwithstanding the *Feres* doctrine.

2. Petitioners assert (Pet. 17-21) that the courts of appeals apply a variety of different analyses to determine the application of the *Feres* doctrine. Those analyses, however, largely represent differing verbal formulations that do not often result in conflicting results. Indeed, in cases involving fact-patterns similar to this case, the courts of appeals have consistently understood that the *Feres* doctrine bars FTCA suits in cases involving active-duty service members injured

while participating in military recreational programs open to them because of their active-duty status. In *Johnson*, this Court cited with approval two of the seminal "military recreation" cases. See 481 U.S. at 687 n.8 (citing *Woodside* v. *United States*, 606 F.2d 134 (6th Cir. 1979) (officer killed in plane crash allegedly due to negligence of civilian flight instructor employed by military flight club), and *Hass* v. *United States*, 518 F.2d 1138 (4th Cir. 1975) (suit by serviceman against civilian manager of military-owned horse stable)); see also *Walls* v. *United States*, 832 F.2d 93 (7th Cir. 1987) (airplane crash during recreational flying); *Millang* v. *United States*, 817 F.2d 533 (9th Cir. 1987) (auto accident during picnic), cert. denied, 485 U.S. 987 (1988); *Bon* v. *United States*, 802 F.2d 1092 (9th Cir. 1986) (boat accident); *Chambers* v. *United States*, 357 F.2d 224 (8th Cir. 1966) (swimming in pool at air base).

Petitioners contend (Pet. 18) that the decision of the court of appeals is inconsistent with the Eleventh Circuit's decision in *Whitley* v. *United States*, 170 F.3d 1061, 1070-1075 (1999). *Whitley*, however, did not even involve a member of the United States military. Instead, the case arose when a British soldier who was in the United States on a rugby tour was injured when a van driven by an American servicemember got into an accident while driving the British soldier/rugby player home from a military rugby tournament. The court in *Whitley* explained that the British soldier's FTCA action was not barred by *Feres* because "[h]e was off-duty during the extended time that he was in the United States to participate in the" rugby tour, *id.* at 1071, and because he was not under military control —even British military control—while he was on the rugby tour, *id.* at 1073 & n.25. Indeed the court in *Whitley* noted that "[p]articuarly significant" to its

decision were cases in which "the service members were not taking advantage of a military privilege or status during their leave or off-duty time." *Id.* at 1074. By contrast, petitioners' decedents were members of the United States (not a foreign country's) military, they were subject to military control at the time of the accident, and they were participating in the boating trip solely as a "military privilege * * * during their * * * off-duty time." There is no conflict between *Whitley* and the court of appeals' decision in this case.

Petitioners also contend (Pet. 20) that the court of appeals' decision conflicts with *Taber* v. *Maine*, 67 F.3d 1029 (2d Cir. 1995). In *Taber*, the court held that an off-duty servicemember who was "spend[ing] a romantic weekend with a companion," *id.* at 1051, could bring suit under the FTCA for an injury suffered when he was injured by another servicemember in a car accident. Unlike petitioners' decedents, the servicemember in *Taber* was not on a military-sponsored activity at the time of the accident, and his "romantic" week-end plans had nothing to do with his military status. There is no conflict between *Taber* and the decision of the court of appeals in this case.

3. Petitioners also argue (Pet. 21-30) that this Court should overrule *Feres*. This Court expressly reaffirmed the *Feres* doctrine in *Johnson*, however, noting that it has never deviated from *Feres* in the decades since that case was decided and that Congress, which has clearly been on notice of this Court's decisions in the area, has never modified the doctrine. See 481 U.S. at 686. In *Johnson*, the Court "decline[d] to modify the doctrine at this late date." *Id.* at 688. "Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is impli-

cated, and Congress remains free to alter what [this Court] ha[s] done." *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-173 (1989). Fourteen years after *Johnson*—and with more than 50 years of precedent now supporting *Feres*—this Court should be even more reluctant to reexamine that settled statutory ruling.

Johnson reiterated that the *Feres* doctrine is supported by three important rationales. First, because "the relationship between the Government and members of its armed forces is distinctively federal in character," it "makes no sense to permit the fortuity of the situs of the alleged negligence to affect the liability of the Government to [the] serviceman." 481 U.S. at 689 (citations and internal quotation marks omitted). Second, "[t]hose injured during the course of activity incident to service not only receive benefits that compare extremely favorably with those provided by most workmen's compensation statutes, but the recovery of benefits is swift and efficient, normally requiring no litigation." *Id.* at 690 (citations and internal quotation marks omitted). Third, "suits brought by service members against the Government for injuries incurred incident to service are barred by the *Feres* doctrine because they are the '*type[s]* of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness.'" *Ibid.* (citations omitted).

Since *Johnson* was decided, the Court has repeatedly denied petitions for certiorari urging that *Feres* be reexamined. In *Sonnenberg* v. *United States*, No. 90-539, the United States filed a brief in opposition explaining why further review to reexamine the *Feres* doctrine is unnecessary in light of *Johnson* and for

other reasons as well.[1] Since the Court denied certiorari in *Sonnenberg*, see 498 U.S. 1067 (1991), the United States has generally waived a response to petitions for certiorari in cases where the only question presented is whether *Feres* should be reexamined. See also *Richards* v. *United States*, 528 U.S. 1136 (2000) (denying certiorari where petition presented questions concerning both the application of *Feres* and the overruling of that case).

The government's brief in opposition in *Sonnenberg* responds fully to the arguments petitioner advances in seeking reexamination of the *Feres* doctrine here. Courts have had little difficulty applying the *Feres* doctrine, which is "alive and well," *Duffy* v. *United States*, 966 F.2d 307, 312 (7th Cir. 1992), and has been "broadly and persuasively applied by the federal courts," *Stewart* v. *United States*, 90 F.3d 102, 104 (4th Cir. 1996) (internal quotation marks omitted). Moreover, courts have extended the *Feres* doctrine to other areas of the law. For example, in the same Term *Johnson* was decided, this Court extended *Feres*'s "incident to service" test to *Bivens* claims. See *United States* v. *Stanley*, 483 U.S. 669, 683-684 (1987). Other courts have applied the *Feres* doctrine to service-related claims brought under 42 U.S.C. 1983 (Supp. V 1999). See *Day* v. *Massachusetts Air Nat'l Guard*, 167 F.3d 678, 683-684 (1st Cir. 1999); see also *Bois* v. *Marsh*, 801 F.2d 462, 470-471 (D.C. Cir. 1986) (*Feres* applies to intentional as well as negligent tort claims against individual military personnel); *Cummings* v. *Dep't of the Navy*, 116 F. Supp. 2d 76 (D.D.C. 2000), appeal pending, No. 00-5348 (D.C. Cir.) (claims under the

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[1] We have supplied petitioners with a copy of our brief in opposition in *Sonnenberg*.

Privacy Act). Contrary to petitioners' contentions (Pet. 25), *Feres*'s "incident to service" test is workable and is not in decline.

Furthermore, the *Feres* doctrine ensures that all service members—including those injured in combat abroad or in their quarters at home—receive a uniform set of benefits for service-related injuries, at a level determined by Congress and the Executive Branch. Compensation is awarded uniformly to all service members who are similarly situated, without regard to whether their injuries were incurred in training, in combat, or while receiving benefits.[2] That uniformity is an indispensable part of maintaining high morale among all our military forces. There is no basis to reexamine it now.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[2] The FTCA specifically bars suits arising in foreign countries or in combat. 28 U.S.C. 2680(k) and (j).